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No. 141

In the Supreme Court of the United States

October Term, 1962

ROBERT FRANKLIN [illegible] AND WILLIAM CONSERVATIVE
[illegible], PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 441

ROBERT FREDERICK HUFF AND WILLIAM CONSTANTINE NICHOLSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (Pet. 20–34) and dissenting (Pet. 34–35) opinions of the court of appeals are reported at 301 F. 2d 760.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1962. A petition for rehearing was denied on July 23, 1962. On August 7, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including September 21, 1962, and the petition was filed on September 19,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently described a fraudulent scheme so as to charge an offense under the wire fraud statute (18 U.S.C. 1343), and, if so, whether allegations that the scheme included a demand for money for the release of a person arrested by Mexican authorities removed it from the scope of the statute.

2. Whether the evidence was sufficient to support the convictions.

STATUTE INVOLVED

Section 1343 of Title 18 of the United States Code provides as follows:

> § 1343. Fraud by wire, radio, or television.
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners were indicted in the Western District of Texas and charged in seven counts with six substantive violations of the wire fraud statute as well as

a conspiracy to violate that statute (R. 1–7).[1] The jury convicted petitioners on all counts (R. 373). Huff was sentenced to seven years' imprisonment—a concurrent sentence of two years on each substantive count to run consecutively to a sentence of five years on the conspiracy count. Nicholson was sentenced to five years' imprisonment on each count to run concurrently (R. 377–380). The facts may be summarized as follows:

In September 1957, petitioners had accused Nazry Abraham of burglarizing petitioner Huff's apartment in El Paso, Texas, and Nazry had denied the accusation. Neither the accusation nor the alleged crime was reported to the local police (R. 23–25, 153, 162). From that time until April 22, 1960, Nazry did not see, speak to or have any contact with either petitioner about the alleged burglary or any other matter (R. 26).

On April 22, 23, 25 and 26, 1960, Antonio Duran telephoned Nazry five times from Juarez, Mexico, to El Paso, Texas, and informed him that a man there possessed jewelry belonging to Huff. Nazry relayed each of these messages to Huff who sought to persuade Nazry to go to Juarez on his behalf, stating that he himself could not go because of illness. On April 26, 1960, Nazry, yielding to Huff's importunities, did agree to meet Duran at a Juarez nightclub known as "El Taurino" (R. 22–23, 26–30). When Nazry met Duran at the nightclub, he was arrested, placed in

[1] Antonio Duran, a Mexican national, was also charged in the indictment. He was not apprehended (R. 20, 33).

an automobile and driven to Guadalupe (R. 33–37). There he was coerced into signing a confession that he had conspired with Duran to break into Huff's apartment in 1957 (R. 38–39). Nazry then pleaded with his captors for permission to see his father, Salim Abraham (R. 40).

On April 27, 1960, at about 8:45 a.m., Salim Abraham, in El Paso, received a telephone call from Huff in Juarez in which the latter said, "Come over here, I have your son here, come alone, I want to talk with you about him." Huff directed Salim to go to the La Sevillana Restaurant in Juarez, Mexico (R. 121–122). Ten minutes later Salim met Huff at the restaurant. Huff accused Nazry of a 1957 theft from his apartment and demanded $22,000 for Nazry's release. Several men came up to the table where they sat, including a man who represented himself to be a Mexican federal agent, and advised Salim to agree to Huff's demand. When Salim refused to pay unless he saw Nazry, he was directed to petitioner Nicholson's automobile. At the car he asked Nicholson, "what is your business with us?" Nicholson replied that he was the driver. Salim, Huff, Nicholson and three Mexicans then got in Nicholson's automobile (R. 125–128, 98–101, 154–156). They drove to Guadalupe where Salim was permitted to speak to his son only in English and in Huff's presence. At the meeting, Huff grabbed Nazry's arm, asked him if he had committed the "robbery" and Nazry said that he had (R. 41, 129).

Salim offered to sign a note for the money requested but Huff demanded cash. When Huff reduced his

demand to $12,000, Salim asked to be taken to El Paso so that he could try to raise the money. Nicholson then drove Huff and Salim at seventy-five to eighty miles an hour to an El Paso bank. At the bank, Salim told Huff and Nicholson "to go back to the La Seviliana Restaurant and wait for me, I will return there in about an hour with the money" (R. 130, 131, 337).

Huff and Nicholson returned to Juarez where they were accosted by two sons-in-law of Salim and by Mexican police. When asked for Nazry's location, Huff replied that everything had been settled and was all right. Petitioners were then arrested. When Salim returned to Juarez, they were in the custody of the police (R. 103–106, 133–137). Two Mexican federal agents who had participated in Nazry's seizure were also arrested (R. 138).

Petitioners had been seen in the La Sevillana Restaurant on four or five occasions prior to Nazry's arrest talking with Mexican government officials (R. 173–174).

On the day following his arrest, in a statement to a State Department officer, Huff said that he had told a Mexican taxicab driver, whose name he did not know, to notify him if Nazry was ever in trouble in Juarez, that the cab driver had informed him that Nazry had been arrested by Mexican authorities and that Huff had called Salim to inform him that his son was in jail (R. 160–161). When the officer referred to a statement that Salim had given to the Mexican police, Huff stated that Nazry had taken items worth $22,000 from his apartment, that Huff had

signed a complaint in a Mexican restaurant accusing Nazry of this alleged crime, and that he had gone to the place where Nazry was being confined to seek restitution for the goods stolen from his apartment (R. 162, 165).

Petitioners introduced evidence showing that Huff's apartment had been burglarized in September 1957 (R. 243, 282), that Nazry had plotted the burglary (R. 190–195) and had rented a safe deposit box shortly after the alleged burglary (R. 218–219), and that a ring from the claimed theft had been found in Mexico (R. 255, 259). They also introduced a document signed by Huff accusing Nazry of the 1957 alleged burglary (R. 165). A Mexican lawyer testified that this document would have been sufficient to initiate a criminal investigation by the police (R. 224–228).

Petitioner Nicholson testified that he was in the restaurant on April 27 when Huff met Salim. He admitted that he drove them to Guadalupe and to El Paso and that he then returned to Juarez. He claimed that his two trips to Juarez on that day were solely for the purpose of obtaining a haircut and that he had chauffeured Huff and Salim merely as a favor to Huff (R. 286–289). He also testified that the ring found in Mexico had been in Huff's home prior to the alleged burglary (R. 281–284).

ARGUMENT

1. The substantive offense proscribed by the wire fraud statute (18 U.S.C. 1343, *supra*, p. 2), like its companion mail fraud statute, consists of two essential elements: (1) the devising of a scheme to defraud

or to obtain money by false pretenses, and (2) the use of a communications facility (here transmittal of sounds in interstate or foreign commerce by wire communication) for the purpose of executing such a scheme. See *Pereira* v. *United States*, 347 U.S. 1, 8. Counts 1 through 6 of the indictment, the substantive counts, alleged these elements. These counts charged, in the language of the statute, that the petitioners together with Antonio Durán devised a scheme to defraud Salim Abraham and to obtain money by means of false representations and that, in execution of the scheme, the defendants caused a telephone call to be made. Each of these counts particularized that the petitioners attempted to lure Nazry Abraham into Mexico by representing to him that he should assist them to recover jewelry taken in an alleged 1957 burglary of Huff's apartment when in truth the petitioners had conspired with Mexican officials to arrest Nazry as soon as he entered Mexico in order to demand $22,000 from Salim Abraham for his son's release (R. 1–5).

It is true that the only false representation alleged was made to Nazry and not to Salim. However, contrary to petitioner's contention, the indictment need not allege nor must the evidence show that false statements were made to the person defrauded. Indeed, there is no necessity that there be any false representations where the indictment is founded on a scheme which, like this one, is fraudulent in its entirety. *Graham* v. *United States*, 120 F. 2d 543, 544 (C.A. 10); *United States* v. *Sylvanus*, 192 F. 2d 96, 105–106 (C.A. 7), certiorari denied, 342 U.S. 943; *Gregory* v. *United States*, 253 F. 2d 104, 109 (C.A. 5);

United States v. *Fromen*, 265 F. 2d 702, 704–705 (C.A. 2), certiorari denied, 360 U.S. 909. The statute itself specifically makes it a crime to use wire communications to execute "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *" (Emphasis added).[2]

That the indictment identified the scheme sufficiently to enable petitioners to prepare their defense is made manifest by the evidence produced in petitioners' defense as well as by the lack of any claim during the trial that they were surprised by the prosecution's case.

The conspiracy count, count 7, also adequately described the fraudulent scheme which was the object of the conspiracy. It is well established that an indictment for conspiracy to commit an offense need not al-

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[2] The sixth count, involving the call from Huff to Salim, is sufficient to support Huff's sentence on the substantive counts, and conviction on either this sixth count or the conspiracy count supports the sentence as to Nicholson (see Pet. App. 29). The trial court, in giving instructions proposed by the petitioners (R. 371–372), instructed the jury that it was not to "consider any testimony that the defendant Antonio Duran may have said or done in connection with the defendants," and went on to say that the "membership of a defendant or any other person in a conspiracy must be established by evidence beyond a reasonable doubt as to his own conduct, what he himself said or did" (R. 360). Read in the light of the instructions as a whole and the fact that the judge submitted the six substantive counts to the jury, the instruction cannot be understood as directing the jury to disregard Nazry's testimony of the telephone calls from Duran. Rather it served to emphasize to the jury the fact that the membership of either petitioner in the conspiracy had to be based on testimony relating directly to that petitioner.

lege the objectives of the conspiracy in such detail as is required to charge a substantive violation. See *Wong Tai* v. *United States*, 273 U.S. 77; *Thornton* v. *United States*, 271 U.S. 414, 423. As this Court observed in *Williamson* v. *United States*, 207 U.S. 425, 447, in a conspiracy indictment, "the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy."

The conspiracy count alleged (R. 5–6):

> That commencing on or about April 20, 1960, and continuing thereafter until on or about April 28, 1960, in El Paso County, Texas, within the El Paso Division of the Western District of Texas, ROBERT FREDERICK HUFF, WILLIAM CONSTANTINE NICHOLSON and ANTONIO DURAN, having devised and having intended to devise a scheme and artifice to defraud Salim Abraham, and to obtain money by means of false and fraudulent pretenses, representations and promises, unlawfully conspired, confederated and agreed together to transmit sounds and to cause sounds to be transmitted, by means of wire communication in foreign commerce, from Juarez, Chihuahua, Mexico, to El Paso, Texas, for the purpose of executing such scheme and artifice and attempting so to do, in violation of Section 1343 of Title 18, United States Code, and to effect the object of their said conspiracy they did the following acts:

The indictment then enumerates sixteen overt acts that were committed to effect the object of the conspiracy (R. 6–7). Coming as it does after the six sub-

stantive offenses, the conspiracy count spelled out enough to notify petitioners of the crime which they were called upon to answer. Petitioners' claim that this count should have descended to more particulars seems hollow in the absence of any showing that they were misled.[3]

Petitioners' contention that the substantive counts of the indictment charged a scheme to extort rather than to defraud is without merit. It is true that if an indictment charges only a scheme to obtain money by means of intimidation and does not charge anything in the nature of fraud or deceit, the wire fraud statute would not be violated. *Fasulo* v. *United States*, 272 U.S. 620. But here the indictment alleged a scheme to defraud and to obtain money by false pretenses and alleged that false representations were made to lure Nazry into Mexico. The allegations that petitioners caused the arrest of Nazry for the purpose of obtaining $22,000 from his father were not repugnant to the fraud charged. Petitioners are not entitled to immunity in their use of fraudulent means because the complete execution of their scheme also involved other wrongful acts which may constitute

[3] Petitioners argue (Pet. 14) that the decision below conflicts with *United States* v. *Mercer*, 133 F. Supp. 288 (N.D. Calif.). Beside the fact that *Mercer* is a district court case, the conspiracy indictment which was there found insufficient included no particulars whatsoever. It was drafted in the words of the statute and did not give the dates of the offense, the names of the persons who were the objects of the scheme, or the place of origination or receipt of the unlawful wire communications. The conspiracy count under attack by petitioners here includes all these particulars.

intimidation." *Muench* v. *United States*, 96 F. 2d 332 (C.A. 8).

2. The sufficiency of the evidence presents no issue warranting further review.

The evidence adduced showed a scheme to defraud. The false representation to Nazry that he should go to Juarez to attempt to recover Huff's jewelry was in itself sufficient to prove that a scheme to defraud had been devised. As pointed out above, the statute does not require that false representations be made to the person from whom the money is sought but rather it condemns the devising of any scheme to defraud where wire communications are used in the execution thereof. In addition to this false representation, the jury could have found, as a component part of the scheme, that false representations were made to Salim that his son had burglarized Huff's apartment and that his son had been legally arrested.[5]

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[4] The court in its instruction cautioned the jury (R. 349):

"Now, the defendants are not on trial for extortion, and you will not consider or be influenced by evidence, if any, that there was any extortion. Unless you find and believe beyond a reasonable doubt that there was a scheme formed by the defendants and each of them to defraud by deception and false representations, you will acquit the defendants and each of them as you may find the facts to be."

[5] The trial judge did not, as petitioners contend (Pet. 10), refuse to instruct the jury that it should acquit if it found true Huff's accusation that Nazry had burglarized his apartment. Petitioners never requested such an instruction. They proposed that the court charge the jury: (1) that it is not a violation of the wire fraud statute to attempt to recoup money "due you by the ones alleged to have been defrauded" and therefore the jury should acquit if they found that Nazry Abraham burglarized Huff's apartment; and (2) that it was the government's

These representations did not vary the proof from the indictment as they were fairly embraced within the scheme charged. Nor does the fact that the victim may not actually have been deceived relieve petitioners of their liability. A fraudulent scheme is punishable even if not successful.

The jury was justified in concluding that Nicholson aided and abetted the scheme and was a participant in the conspiracy. He participated with Huff in the 1957 accusation that Nazry had burglarized the apartment and was present in more than a casual capacity at every important step thereafter. His own testimony puts him in the Juarez restaurant when Huff demanded $22,000 from Salim Abraham for his son's release. He drove Salim, Huff and three Mexicans to Guadalupe to enable Salim to see his son, telling Salim, when he asked "what is your business with us?" that he was the driver. He then drove Huff and Salim at high speeds to the El Paso bank to enable Salim to withdraw the money sought. He returned to Juarez after Salim told him and Huff that he would meet them there "with the money." Upon this evidence the jury was properly allowed to find him to be a knowing participant and not a mere spectator.

Petitioners argue further (Pet. 14–16) that the conspiracy convictions were erroneous in that there was

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burden to prove that no burglary had occurred and therefore the jury should acquit if they had a reasonable doubt as to whether a burglary had occurred (R. 367–368). An instruction to acquit if the jury found that Nazry burglarized the apartment would have been erroneous since this fact alone would not have justified the fraudulent conduct of petitioners.

no evidence that Nicholson knew of or intended the making of any interstate or foreign telephone call for the purpose of executing the alleged scheme; that to make out the conspiracy charged, the proof must show that both parties agreed to make such use of wire communications; and that the failure of proof as to Nicholson precludes conviction since there could be no agreement.

Contrary to petitioners' contentions, there is ample evidence from which the jury could have found that it was part of the conspiracy that a telephone call between Juarez, Mexico, and El Paso, Texas, would be made in order to execute the scheme. It is not necessary that petitioners expressly agreed that such a communication be made. It is enough if there was an implicit understanding that such a call would be made. The nature of the scheme was such that the jury could have found that its success reasonably required that a telephone call be made to bring Salim into Mexico. The scheme necessitated that Huff persuade Salim personally, with the aid of some Mexican police officers or with persons posing as officers, that it was in Salim's best interests to pay Huff money to obtain his son's release from custody. The jury could also have found that petitioner's scheme contemplated that they place themselves beyond the jurisdiction of the laws of the United States, thereby making a telephone call a necessary step in its execution. Another circumstance showing Nicholson's awareness of the telephone call is his presence in the restaurant at the time of the meeting between Huff and Salim. In this respect, Nicholson himself testi-

fied that he was in the Juarez restaurant for about ten minutes before Salim arrived (R. 286) while other evidence showed that Salim met Huff in the restaurant ten minutes after Huff telephoned him (R. 125).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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